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Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 964.

LAWRENCE CAPITOL, INC.,
Petitioner,

v.

STANLEY-WARNER CORPORATION ET ALS.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENTS (OTHER THAN ESSEX SAVINGS BANK) IN OPPOSITION.

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Questions Presented for Review.

(1) Whether a Court of Appeals is not fully warranted in dismissing an appeal for lack of diligent prosecution where petitioner, after the expiration of a period of over four months, had not substantially advanced preparation of its brief or record-appendix, nor even filed a timely motion for further extension; sought to have the court below review alleged errors in exclusion of evidence and direction of verdict in an antitrust case involving 1,500 pages of testimony on a proposed record-appendix of 6 transcript pages; and deliberately failed, for nearly two months, to file the requisite designation of record.

(2) Whether the discretionary jurisdiction of this Court should be exercised in favor of a party whose petition as-

serts its consistent position to be a contention which is not only patently captious but flatly contradicted by a number of its pleadings below.

Statement.[1]

The Underlying Case.

As background for the issue raised in the petition, it should be noted that the litigation involved consists of two motion-picture treble-damage complaints against various distributors and numerous local (Lawrence, Massachusetts) individuals and corporations filed in November, 1954, and April, 1955. In 1957 the validity of a 1952 general release granted by the petitioner, for very substantial consideration, was upheld, against contentions that it had been obtained by fraud and duress (*Lawrence Capitol, Inc.*, v. *Stanley-Warner Corporation*, 152 F. Supp. 889 (D. Mass. 1957); aff'd *per curiam*, 254 F. 2d 814 (1st Cir. 1958)), as a result of which the trial in the District Court (from which the appeal below was taken) involved a maximum damage period of some two years. Following twelve days of trial in which the petitioner's chief executive officer and stockholder (152 F. Supp., *supra*, at p. 890; R. 13, 15) was the principal witness on the merits (*cf.* P. 6), District Judge Caffrey directed a verdict for all defendants, on a variety of equally dispositive grounds, including want of sufficient evidence of conspiracy, lack of proof of proximate cause of any damage, inadequate evidence of the amount of damages and the binding effect of ultimate facts determined adversely to petitioner in the prior litigation. *Lawrence Capitol, Inc.*, v. *Stanley-Warner Corp.*, 206 F. Supp. 615 (D. Mass. 1962).

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[1] References are to P. —Petition for Writ of Certiorari; R. —Certified Copy of Proceedings Filed by Petitioner.

THE PETITIONER'S CONDUCT OF ITS APPEAL.

In the interests of brevity, the facts relating to the following significant aspects of petitioner's conduct of its appeal below are set out in the Argument, *infra*:

Petitioner secured ample time for preparation of its appeal (pp. 4-5).

Failed to furnish designation of record (pp. 5-6).

Failed to timely file brief and record-appendix, or any request for extension of time (p. 6).

Failed to file timely motion to recast in its entirety the form of petitioner's appeal (pp. 6-7).

Attempted to conduct appeal with completely inadequate record-appendix (p. 7).

Argument.

The issue raised by the petition was correctly decided below. The basis of dismissal of petitioner's appeal to the First Circuit was not non-compliance with a "procedural formality" (P. 4), but an almost reckless disregard by petitioner's attorneys, including the principal owner of the petitioner, of the rules binding on, and responsibilities of, an appellant.

Petitioner's explanation of the sole aspect of its conduct below which its application discusses is that a designation of the record below was not furnished as required by the rules of the First Circuit, because petitioner did not deem any record essential for the consideration of the Court of Appeals. This suggestion appears to be adopted solely for purposes of the petition, and to be contradicted by the numerous pleadings of the petitioner below. The petitioner is undeserving of any exercise of this Court's discretionary jurisdiction.

I.

The Dismissal of the Appeal was Clearly Warranted by Petitioner's Persistent Disregard of its Responsibilities as an Appellant.

Contrary to petitioner's suggestion (P. 2, 4, 7), its appeal was *not* dismissed solely because of a failure to furnish appellees with a designation of the record proposed to be printed.[2] Rather, the court below had before it, in passing on the dismissal (and the subsequent motion for reconsideration of the dismissal), the actions of petitioner here described which, severally and *in toto*, constitute a disregard of the obligations of an appellant so complete as to evince a casual contempt for the whole process of appeal.

Preliminarily it should be noted that both of the counsel for petitioner, who appear in the proceedings below (R. 2, 11, 13), were familiar with the rules and requirements of appeals in the First Circuit by reason of their handling of the unsuccessful prior appeal of the plaintiff (254 F. 2d 814 (1st Cir. 1958)). Moreover, if material, it may be observed that there is no aspect whatsoever in this case of a party losing rights by reason of the defaults of his attorneys for which he should not be fairly charged, because the sole owner of the petitioner is one of the attorneys of record (R. 13, 15).

(1) The claim of appeal was filed on July 6, 1962 (P. 3); the stenographic transcript was filed (with petitioner's copy available to it) by August 16, 1962 (R. 3). Pursuant to extension secured from the District Court (F.R.C.P. 73(g)) the petitioner's time for docketing the case in the Court of Appeals was extended until October 15, 1962 (R. 1, 16). This extension alone provided the petitioner with

[2] As pointed out (II, *infra*), even this one ground of the action of the court below, which petitioner does acknowledge, has been seriously misstated in its petition.

seven weeks in which to work on the transcript in preparation of its brief and record-appendix. Upon the docketing of the case in the Court of Appeals the petitioner, who would have, under the rules, thirty days thereafter to file its brief and record-appendix, moved for forty more (or a total of seventy additional) days for this purpose (R. 3). On such motion the court below granted thirty-two additional days, giving the petitioner until December 31, 1962 (R. 6), to file its brief and record-appendix. As a result of the foregoing steps the petitioner obtained somewhat over four months (or from August 16 to December 31) to study the transcript, select and designate its record-appendix and write its brief. This was a more than ample period of time, in view of the fact that the cases had been pending since 1954-1955, with many of the questions raised on appeal already having been extensively briefed and developed over that period (*cf.* R. 28), and in view of the further fact that the bulk of the testimony below came from the petitioner's own chief executive officer (R. 13).

Notwithstanding, the motions filed by petitioner on December 26, 1962, and January 2, 1963, clearly revealed to the court below that petitioner had not at that late date even selected, much less commenced the printing of, the record materials to constitute its appendix or had a brief in any state near completion.

(2) As set out in the petition (P. 3), Rule 23 of the rules of the First Circuit (as in effect at that time) requires an appellant to designate, within ten days of the docketing of his case, the points which he intends to argue and the portions of the record which he proposes to print. Here, although petitioner filed its statement of points on November 5, 1962 (R. 6), neither then nor at any time thereafter did it file a designation.

The implications of dilatoriness from the foregoing action by petitioner went beyond the non-compliance with the

rule, important and essential as that rule may be. Not only had petitioner omitted, from November 5, until December 31, to file the designation, but, on December 31, 1962, petitioner was not sufficiently advanced in the preparation of its necessary appeal documents to be able to then and there file the designation, but, rather, needed (and sought) a still further extension for the purpose (R. 17).

(3) Petitioner not only proceeded in so laggardly a fashion that it was nowhere near completing a brief and record-appendix in the four months' time available ((1), *supra*) but when, in view of such lack of diligence, it became obvious to petitioner that it would not be ready by December 31, 1962, petitioner nevertheless delayed until far too late to seek any necessary extension of time. With its time expiring on the 31st of December, petitioner delayed filing any motion for an extension until the 26th of the month (R. 7). Under the rules of the court below (Appendix, p. 11, *infra*) any such motion requires a return day three days later (Sundays and holidays excluded). On petitioner's motion, filed on December 26, 1962, such a return day (*i.e.*, the first day the court could consider the matter) would have been January 2, 1963, or after petitioner's already extended period of time *had already expired.*

Once again petitioner thus had evinced a disregard, not only of the rules, but of its own self-interest; having waited until so late a date, petitioner was in no position to protect itself against the possibility that its motion would be denied or even granted only in limited part. This conduct shows such little concern over the fate of its appeal that a conclusion of want of diligence is virtually dictated.

(4) Petitioner appears guilty of a lack of candor and good faith, as well as diligence, in its last-moment efforts to obtain approval to recast its appeal papers entirely, from the usual printed record and briefs, to a typewritten

format. Although, on the statement made in support of this motion by petitioner (filed on January 2, 1963), the necessity to take this step must have been known to it by early November, 1962 (R. 16, 17), petitioner failed to initiate action to secure such relief at that time. When, on December 26, 1962, petitioner moved for its extension, described above, its intentions in regard to use of typewritten record and brief were still not revealed to the Court of Appeals, for the motion was consistent solely with proceeding in the usual form (R. 7). When, on January 2, 1963, petitioner did ask for leave to proceed on typewritten papers, its action constituted, for the court below, a further demonstration of petitioner's disregard, not only of the rules, but of considerations of candor and straightforward dealing with the court.

(5) The final demonstration of petitioner's lack of serious intendment with respect to its appeal was furnished by the brief and "record-appendix" which petitioner filed in the court below with its motion for reconsideration.

The "brief" argued, in a number of instances (R. 23), alleged errors in the exclusion of evidence, as well as the basic contention that the District Court should not have directed a verdict because petitioner had adduced a prima-facie case of conspiracy. In sum, petitioner was raising an argument which, if it were to claim any serious consideration from an appellate tribunal, would clearly require frequent and copious resort to the underlying testimony. But, in support of such a brief, petitioner proposed to print, as a record-appendix, only some *six* pages of transcript (P. 8). It simply cannot be seriously maintained that this method of proceeding represents a diligently prosecuted appeal.[8]

[8] Since, on this ground alone, the court below would have dismissed the appeal eventually (*Gallarelli* v. *United States*, 248 F. 2d 539, 540 (1st Cir. 1957); *Shankman* v. *Aspinook Corp.*, 215 F.

In short, the action of the court below rested, not upon the sole (and misstated (II, *infra*)) ground referred to in the petition, but upon a series of actions evidencing a disregard of petitioner's self-interest and of the responsibilities of an appellant, the sum total of which constituted an abuse of the appellate process.

II.

THIS COURT'S DISCRETIONARY JURISDICTION SHOULD NOT BE EXERCISED IN FAVOR OF A PARTY WHICH DELIBERATELY STATES IN ITS PETITION A CONTENTION FLATLY CONTRADICTED BY ITS WRITTEN PLEADINGS BELOW.

As described above, the petition asserts, in respect of the one ground of the lower court's action which is acknowledged and dealt with therein, that petitioner was never obligated to furnish a designation of the record "because it has not deemed any part of the record so 'essential'" (P. 4; *cf.* P. 8).

(1) As already suggested (I (5), above), the proposition that no record (printed or typewritten) is essential for appellate consideration of an antitrust case involving 1,500 pages of transcript and 190 exhibits (P. 6) on an appeal alleging error as to numerous evidential rulings and asserting that evidence made the granting of a directed verdict error is clearly captious and justifies the action of the Court of Appeals.

(2) But this particular contention also constitutes a separate and distinct reason why the discretionary writ prayed for should not be granted, because it is flatly contradicted by other action of the petitioner below:

2d 902, 904 (1st Cir. 1954)), its action in doing so at this stage, in the context of the numerous other defaults of petitioner, can present no substantial question of departure from the accepted course of proceeding.

(a) On October 25, 1962, petitioner filed a motion expressly seeking an extension to November 23, 1962, of "the time for furnishing to the appellees and the Clerk of this Court, a statement of the parts of the record which *it proposes to print in the record appendix to its brief* . . ." (R. 4-5).

(b) On October 25, 1962, petitioner also moved "that the time for filing the consolidated brief for the Appellant with consolidated *record appendix* be enlarged . . ." (R. 3).

(c) Petitioner's motion of December 26, 1962, for a further extension of time was expressly entitled "Motion for Extension of Time to File Consolidated *Record Appendix* and Consolidated Brief" (R. 7).

(d) The motion filed by petitioner on January 2, 1963, is expressly entitled "motion of appellant to type *record appendix*, brief and other documents, etc." (R. 9).

These statements in petitioner's own pleadings (emphasis added) in the court below show clearly that at all times petitioner intended to file a record-appendix. Therefore its statement in the petition (P. 2, 4, 8) that it has not deemed any part of the record essential for such printing misstates its own previous record positions, and constitutes, at best, a careless and, at worst, a deliberate misrepresentation to this Court. In any event, this conduct, apart from all other considerations, disentitles the petitioner to any benefit of this Court's discretionary and selectively exercised powers of review.

Wherefore respondents urge that the petition for writ of certiorari should be denied.

Respectfully submitted,

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United Artists Corporation,
Republic Pictures Corporation,
Massachusetts Amusement Corporation,
Stanley-Warner Corporation,
Warner Bros. Theatres, Inc.,
Warner Bros. Circuit Management Corporation,
Stanley-Warner Circuit Management Corporation,
Warner Bros. Pictures, Inc.,
Warner Bros. Pictures Distributing Corporation.

Appendix.

RULES OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT IN EFFECT AT TIMES INVOLVED IN THIS CASE.

Rule 36.

MOTIONS.

(1) FORM—FILING. All motions to the court shall be in typewritten form, except those which are required to be printed under paragraph (3) of this rule, and shall contain a brief statement of the facts and the grounds of the motion; and may be accompanied by a memorandum in support thereof. Four copies of the motion and of each accompanying document shall be filed with the clerk. If the motion is assented to or is joint, the clerk will submit it forthwith to the court for consideration. If the motion is not assented to or is not joint, it must be accompanied by a proof of service upon adverse counsel of (a) a copy of the motion, (b) a copy of any accompanying document, and (c) a copy of the proof of service itself, and such proof shall recite the manner and date of service. Thereby the adverse counsel may determine the return day which is automatic under the next paragraph.

(2) RETURN DAY—OPPOSITION—SUBMISSION. The return day of the motion shall be the third day (sixth day in cases from Puerto Rico) after the date of service unless the movant serves and files a notice fixing a later return day. (Sundays and holidays shall be excluded in the calculation of time under this rule.) The opposing counsel may, before 10:30 o'clock in the morning of the return day or within any extension of time made by the court or a judge thereof, file four copies of a memorandum in opposition to the motion, with proof of service; the motion will then stand submitted, unless oral argument is directed by the court.